RECENT CASES.

BILLS AND NOTES—DURESS—SURETY—NOTICE OF DEFECTIVE TITLE—A promissory note, obtained from the maker by duress was signed by the surety without notice of the duress. *Held:* The surety could avail himself of the plea of duress against his principal. Bitner v. Diehl, 61 Pa. Super. Ct. 483 (1916).

The general rule is that duress is a personal defense which can be set up only by the person subjected to the duress. Robinson v. Gould, 11 Cush. 55 (Mass. 1853); Hazard v. Griswold, 21 Fed. 178 (1884). An exception is recognized when a surety gives his bond to secure the release of his principal from illegal arrest or imprisonment. Patterson v. Gibson, 81 Ga. 802 (1888); Schuster v. Arena, 83 N. J. L. 79 (1912). An exception is also made where the principal and surety are in close relationship. Osborn v. Robbins, 36 N. Y. 365 (1867); Schultz v. Catlin, 78 Wis. 611 (1891). It is also a general rule that whatever discharges the acceptor of a bill or the maker of a note, also discharges the drawer and indorser who are sureties. Gunnis v. Weigley, 114 Pa. 191 (1886). So where the surety has no knowledge of the duress practiced upon his principal he will be discharged. Graham v. Marks, 98 Ga. 67 (1895); Griffith v. Sitgreaves, 90 Pa. 161 (1879); Fountain v. Bigham, 235 Pa. 35 (1912). But a voluntary indorser of a negotiable instrument is not relieved from liability because it was given by the maker to escape prosecution. Bowman v. Hiller, 130 Mass. 153 (1881); East Stroudsburg Nat. Bank v. Seiple, 13 D. R. 575 (Pa. 1904). And the defense of duress does not avail the surety when the instrument is in the hands of a holder in due course. Clark v. Pease, 41 N. H. 414 (1860).

CIVIL PROCEDURE—REPLEVIN—DEMAND—A vendee of certain goods, under a conditional bill of sale, abandoned them upon the premises of her landlord, who attached and held possession of the goods on account of unpaid rent. *Held:* A demand for the possession of the goods was necessary before the vendor could maintain an action of replevin. Crown Co. v. Reilly, 96 Atl. 481 (N. J. 1916).

The doctrine, at common law, was that replevin could be maintained only when the goods and chattels were so taken that an action of trespass *de bonis asportatis* would lie. A mere unlawful detention, without an original wrongful taking, was not sufficient. Bruen v. Ogden, 11 N. J. L. 370 (1830); Herdic v. Young, 55 Pa. St. 176 (1867). By statute, in practically all of the states the action is also given for an unlawful detention, although the original taking was unlawful. Whitman v. Merrill, 125 Mass. 127 (1878); Gildas v. Crosby, 61 Mich. 413 (1886). But replevin will not lie in all cases where goods are in another's possession. There must be, in addition, an actual conversion, or a refusal to deliver on demand. Newman v. Jenne, 47 Me. 520 (1860); Veader v. Veader, 87 N. J. L. 140 (1915). Accordingly, replevin cannot be maintained by the mortgagee of personal property, against the mortgagor, after default or condition broken, without demand for possession first made. Black v. Pidgeon, 70 N. J. L. 802 (1904).

The general rule is that if the possession was rightfully acquired, a demand is ordinarily necessary to make the subsequent detention wrongful; and replevin will not lie against one who has obtained possession of property lawfully, until a proper demand is made for the same, and possession refused. Ohio, *etc.*, Rwy. Co. v. Noe, 77 Ill. 513 (1875); Goodwin v. Wertheimer, 99 N. Y. 149 (1885).

CONTRACTS—COVENANT TO PAY TAXES—FEDERAL INCOME TAX—In a railroad lease the lessee covenanted to pay all taxes, charges and assessments, which should be assessed or imposed on the demised premises, the business there carried on, the gross or net receipts derived therefrom, the capital stock or the dividends thereon, or upon the franchises of the lessor. *Held:* The lessee is not required to pay the Federal Income Tax on the rental in relief of the lessor. Little Schuylkill Co. v. Phila. & Reading Ry. Co., 25 D. R. 132 (Pa. 1916).

Before the Sixteenth Amendment, Federal income tax laws were held unconstitutional on the ground that an unapportioned tax on income derived from property was in substance equivalent to a direct unapportioned tax on the property itself. Pollock v. Farmer's Loan & Trust Co., 158 U. S. 601 (1895). But a tax on incomes is not a tax on property as such, and this amendment merely provides that income taxes do not have to be apportioned from whatever source derived. Black on Income Taxes (2nd Ed.), Chap. IV, Sec. 187, *et seq.;* Brushaber v. Union Pac. R. R. Co., 240 U. S. 1 (1916). In the principal case the income tax was considered a tax on the net income from rent, but whether it is so considered or technically viewed as a tax on rent is immaterial, where the agreement is in substance and in appropriate terms to pay the income tax, and in such a case the lessee is required to pay it. North Penn. R. R. Co. v. Phila. & Reading Ry. Co., 249 Pa. 326 (1915). As a rule of construction of leases the lessee is only obligated to pay those taxes which he has expressly assumed to pay, irrespective of what the grantor's intent may have been. Robinson v. Allegheny County, 7 Pa. 161 (1847).

CONTRACTS—RESTRAINT OF TRADE—AGREEMENT TO ABSTAIN FROM BUSINESS—The owner of a blacksmith shop in the country, sold it with a contract that he would not engage in the business in that neighborhood. *Held:* The contract was valid and enforceable by injunction. Boggs v. Friend, 87 N. W. 873 (W. Va. 1916).

All contracts, for the restraint of trade, are not to be deemed unlawful, if merely incidental to the sale and transfer of a business, and for the reasonable protection of the purchaser thereof. Generally, the test applied is the reasonableness of the restraint imposed by the terms of the contract. Diamond Match Co. v. Roeber, 106 N. Y. 473 (1887); Herreshoff v. Boutineau, 17 R. I. 3 (1890). In passing upon the validity of such contracts, public interests, as well as those of the immediate parties, must be consulted and protected; and contracts calculated to cause one to become a public charge, or to deprive the public of valuable benefits, will not be enforced. Oregon St. Navigation Co. v. Winsor, 20 Wall. 64 (U. S. 1873); Gibbs v. Consolidated Gas Co., 130 U. S. 396 (1888). Where such

a contract is not definitely limited in time and space, the modern tendency is to construe it as intending only such sufficient time and such reasonable space as may be necessary to protect the purchaser in the business purchased. Anchor Electric Co. v. Hawkes, 171 Mass. 101 (1898); Hubbard v. Miller, 27 Mich. 15 (1873). Generally where the time is not specifically limited by the terms of the contract, the implication is that the agreement is to be operative during the seller's life, if necessary to protect the purchaser. Saddlery Mfg. Co. v. Hillsborough Mills, 68 N. H. 216 (1894); Kramer v. Old, 119 N. C. 1 (1896).

DIVORCE—COLLUSION—PROMISE TO REMARRY—A wife, who had secured a divorce upon the faith of her husband's promise to remarry her, sought to have the decree vacated on the ground of collusion. *Held:* The decree of divorce could not be revoked. Henderson v. Henderson, 156 N. W. 245 (N. D. 1916).

The courts have the power to vacate a decree of divorce. Kerr v. Kerr, 41 N. Y. 272 (1869), and by the great weight of authority will exercise it in case of fraud. Dunham v. Dunham. 162 Ill. 589 (1896); Uecker v. Thiedt, 137 Wis. 634 (1909). The fraud may be on the jurisdiction of the court, Corney v. Corney, 79 Ark. 289 (1906); Kearns v. Kearns, 70 N. J. Eq. 483 (1905); or on the party securing the divorce. Brown v. Grove, 116 Md. 84 (1888); Olmstead v. Olmstead, 41 Minn. 297 (1889). But the power is exceptional and will not be exercised when the petitioner is guilty of *laches*. Whittley v. Whittley, 111 N. Y. S. 1078 (1908); Catts v. Catts, 35 Pa. Super. Ct. 293 (1908). Even then public policy may require the decree to be opened. Richardson v. Richardson, 67 N. J. Eq. 437 (1904). A decree is not likely to be set aside where one of the parties has remarried. Zeitlin v. Zeitlin, 202 Mass. 205 (1909). But the fact of remarriage does not prohibit the court from vacating a decree, Allen v. Maclellan, 12 Pa. 328 (1849); Horton v. Stegmyer, 175 Fed. 756 (1910); even though children have resulted from the subsequent union. Lake v. Lake, 108 N. Y. S. 964 (1908). See also Appeal of Fidelity Ins. Co., 93 Pa. 242 (1880); Taylor v. Taylor, 52 Pa. Super. Ct. 388 (1913). Generally a decree of divorce will not be set aside when it has been procured by collusion. Simons v. Simons, 47 Mich. 253 (1881); Miltimore v. Miltimore, 40 Pa. 151 (1861). Where a promise has been made to remarry the petitioner, as in the principal case, the decree will not be vacated. Karren v. Karren, 25 Utah, 87 (1902); Robinson v. Robinson, 77 Wash. 663 (1904). The same is true where the complainant has been negligent. Champion v. Woods, 79 Cal. 17 (1889); or where consent has been given to the decree, Rindge v. Rindge, 22 Ind. 31 (1864); Maher v. Trust Co., 95 Ill. App. 365 (1901). But the courts are by no means unanimous on the subject of collusion, and many will vacate a decree collusively obtained. Danforth v. Danforth, 105 Ill. 603 (1883); Winder v. Winder, 86 Neb. 495 (1910). See also Nagle v. Nagle, 43 Pa. Super. Ct. 442 (1910).

EQUITY JURISDICTION—INJUNCTION—ENJOINING PROCEEDING AT LAW—A contract, to which two persons were joint parties, was modified by one of them without authority from the other. The former then sued upon

the modified contract in his own name. *Held:* An injunction could issue restraining the party from prosecuting the suit. Wolcott v. National Signaling Co., 228 Fed. 811 (1915).

In a prior action between the parties in the principal case, it was held that as they were jointly interested in the original contract, any claim under it must be made jointly by the two parties. National Signaling Co. v. Fessenden, 207 Fed. 915 (1913). When there is such a unity of interest as to require a joinder of all the parties interested in a personal action, a release given by one is as effectual as a release given by all. Osborn v. Martha's Vineyard R. R., 140 Mass. 549 (1886). Where two parties are jointly interested in a contract, a judgment in favor of one would bar any subsequent action by him upon the contract, and would therefore operate to defeat all action thereon. Cowley v. Patch, 120 Mass. 137 (1876); Spencer v. Dearth, 43 Vt. 98 (1871). The settlement of rights between joint tenants or joint owners of property is a familiar subject-matter of equity jurisdiction; and when two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself, or to impair its worth to the others. Jackson v. Ludeling, 21 Wall. 616 (1874).

EQUITY JURISDICTION—NUISANCE—USE OF PREMISES—KNOWLEDGE OF OWNER—A statute authorized an injunction to prevent the use of premises for the keeping of a disorderly house. The owner did not know that the house, which was leased through an agent, was being used for the wrongful purpose. *Held:* An injunction was properly issued against the owner. Moore v. State, 181 S. W. 438 (Tex. 1916).

At law, when the nuisance necessarily arises from the use of the thing demised or because of the use for which it was demised, the landlord is liable. Grandy v. Jubber, 5 B. & S. 78 (Eng. 1864); Fish v. Dodge, 4 Den. 311 (N. Y. 1847). But when the nuisance results from the improper use of the premises by the tenant, he alone is liable. Gilliland v. Chicago & A. R. Co., 19 Mo. App. 411 (1885); Miller v. N. Y., *etc.*, R. R., 125 N. Y. 118 (1890). A bill in equity to restrain a nuisance lies only against those who, at law, would be liable to respond in damages, 2 Wood on Nuisance, 3d Ed., p. 1164. If a landlord rents a building for the express purpose of having conducted therein a business which is a nuisance *per se,* he is liable, and must be presumed to have intended the usual results and concomitants. Cahn v. State, 110 Ala. 56 (1895); Givens v. Van Huddiford, 4 Mo. App. 499 (1877). So, an injunction will lie against an owner who knowingly rents premises used in the illegal sale of liquor, Martin v. Blattner, 68 Iowa 286 (1886), or to be used for purposes of prostitution. Tedescki v. Berger, 43 So. 960 (Ala. 1907); Marsan v. French, 61 Tex. 173 (1884). It has been held, in a proceeding to abate a disorderly house, that the owner is charged with the knowledge of his agent in charge of the property. State v. Stroup, 155 N. W. 90 (Minn. 1916).

EQUITY JURISDICTION—STRIKES—PICKETING—The laborers in a foundry combined to strike for the purpose of unionizing the establishment. The foundry was picketed and other employees peacefully persuaded not to

work. *Held:* The strike was lawful and the picketing could not be enjoined. Shaughnessey v. Jordan, 111 N. E. 622 (Ind. 1916).

The legality of strikes depends on the object sought to be obtained and the means used. A strike for the purpose of compelling an employer to advance wages or desist from reducing wages is not in itself illegal. Willcut, *etc.*, Co. v. Driscoll, 200 Mass. 110 (1908); Karges Furniture Co. v. Amalgamated, *etc.*, Union, 165 Ind. 421 (1905). But a strike to get rid of a foreman because some of the workmen have a dislike for him, is not for a lawful purpose. De Minico v. Craig, 207 Mass. 593 (1911); Bausbach v. Reiff, 224 Pa. 559 (1914). However, if the purpose is the strengthening of the union by compelling the discharge of non-union men, it has been held not unlawful. Kemp v. Division No. 241, 255 Ill. 213 (1912): but see *contra*, Folsom v. Lewis, 208 Mass. 336 (1911). In Erdman v. Mitchell, 207 Pa. 79 (1903), it was held that a combination to prevent an employer from employing others by threats of a strike, was an unlawful purpose.

The courts differ on the question of the legality or illegality of picketing by the striking employees. All are agreed that picketing accompanied by threats and intimidation, is unlawful, and will be enjoined. Kolley v. Robinson, 187 Fed. 415 (1911). Coercive measures will be restrained. McCormick v. Local Unions 216, 32 Ohio C. C. 165 (1908). A number of courts have also held that even peaceful picketing should be restrained; *In re* Langell, 178 Mich. 305 (1914); Pierce v. Stableman's Union, 156 Cal. 70 (1909); for a picket, in its very nature, tends to accomplish riots and disturbances of the peace. Barnes v. Chicago Typo. Union, 232 Ill. 424 (1908). But the majority of courts agree with the principal case that peaceful picketing is permissible and lawful, as long as it is confined strictly to peaceful persuasion and argument. Goldfield Mines Co. v. Goldfield Miners' Union, 159 Fed. 500 (1908); Jones v. Van Winkle Gin, *etc.*, Co., 131 Ga. 336 (1908); Bittner v. West Virginia, *etc., Co.*, 214 Fed. 716 (1914).

EQUITY—PLEADING—DISMISSAL OF BILL—After a general finding by the master in favor of the defendant and after the filing of an appeal by the complainant, the latter was allowed to dismiss his bill without prejudice. *Held:* Such a discontinuance involved more than the incidental annoyance of a second litigation and was prejudicial to the defendant in that it deprived him of the findings in his favor which were ***prima facie*** correct; the voluntary dismissal should not have been granted. Smith v. Carlisle. 228 Fed. 666 (1916).

It is a well-recognized doctrine of equity that the complainant may voluntarily dismiss his bill, without prejudice, at any time before the final decree, if there has been no cross-bill. Lowenstein v. Glidewell, Fed. Cas. No. 8, 575 (U. S. 1878); City of Detroit v. Detroit Ry. Co., 55 Fed. 569 (U. S. 1893); Paltzer v. Johnston, 114 Ill. App. 493 (1904). And if the cross-bill is purely a matter of defense, the dismissal is still allowed, and carries with it the dismissal of the cross-bill. Story: Equity Pleading, Sec. 399, note; Pethtel v. McCullough, 49 W. Va. 520 (1901). This right, however, is generally considered to be at the discretion of the court, according to the rights of other parties. Chi. & Alton Ry. Co. v. Union Mill Co.,

109 U. S. 702 (1884); Ebner v. Zimmerly, 118 Fed. 818 (1902). And so if there has been a finding, as in the principal case, entitling the defendant to a final decree, or if he would be materially damaged by it, the courts will generally refuse to grant a voluntary dismissal without prejudice. Gilmore v. Bort, 134 Fed. 658 (1905); State v. Hemingway, 69 Miss. 491 (1891); Saylor's Appeal, 39 Pa. 495 (1861). It appears, however, in Illinois, that the right of voluntary dismissal is absolute in the absence of a cross-bill. Reilly v. Reilly, 28 N. E. 960 (Ill. 1891). See also on this point, 1 Beach: Modern Equity Practice, p. 469 ff.

EVIDENCE—*Res Gestae*—A witness was awakened by deceased entering the room, her throat badly cut. He was allowed to give in evidence what the deceased then said, although there was an unknown lapse of time between the *res gestae* and the declaration. State v. McLaughlin, 70 So. 925 (La. 1916).

The rule of this case is that in deciding whether a declaration should be received in evidence as part of the *res gestae,* the test is not whether it was made contemporaneously with, or immediately before or after, the receipt of the wound; but whether it is a spontaneous statement, caused by a state of mind created by the wound, continuing until the time of the declaration.

The strict and earlier view of this matter, still adhered to in some jurisdictions admitted only those declarations made while the event was taking place. Rex v. Bedingfield, 14 Cox C. C. 341 (Eng. 1879); McCarrick v. Kealy, 70 Conn. 642 (1898). The modern tendency is toward a much more liberal view. Jack v. Mutual Association, 113 Fed. 49 (1902). The principal case is in accord with the widely accepted rule which makes spontaneity the test of admission. Each case, however, being largely determined on its own peculiar facts, there is a wide divergence in the application of this rule. 3 Wigmore: Evidence, Secs. 1747 and 1749 ff.; Heckle v. So. Pac. Ry., 123 Cal. 441 (1899); Scheir v. Quirin, 77 App. Div. 624 (N. Y. 1902); Commonwealth v. Werntz, 161 Pa. 591 (1894). In some jurisdictions the admission of such declarations is greatly widened in scope by statute. Brooks v. Holden, 55 N. E. 802 (Mass. 1900).

EVIDENCE—TESTIMONY OF WIFE AGAINST HUSBAND—A prisoner charged with murder, pleaded self-defense, and claimed that he had found his wife in a compromising situation with the deceased; that in the quarrel that ensued the deceased had drawn a revolver. whereupon the defendant struck him with a stove poker. The wife denied any improper relations with the deceased. *Held:* The evidence was admissible under the Act of April 11, 1889 (P. L. 42), section 2, providing that where in any criminal proceeding the husband makes a defense which attacks his wife's character or conduct, she shall be a competent witness in rebuttal for the commonwealth. Commonwealth v. Garanchoskie, 96 Atl. 513 (Pa. 1916).

At common law a wife could testify neither for nor against her husband in any suit to which he was a party. Kischmar v. Scott, 166 Mo. 214 (1901); Miller v. Stebbins, 77 Vt. 183 (1905). Where, however, the husband's interest in the suit was merely collateral and indirect, and where the record

could not be used against him in another action, the wife was a competent witness. Phillips v. Poulter, 111 Ill. App. 330 (1903). In a few anamolous cases based on public policy, the wife was a competent witness though the husband was directly interested. Cramer v. Hart, 154 Mo. 112 (1900); Trometer v. Dis. Col., 24 App. D. C. 242 (1904); State v. Wiseman, 130 N. C. 726 (1902). In most jurisdictions statutes now enable a husband or wife to testify in the other's behalf, cf. Act of April 15, 1869, P. L. 30 (Pa.); also Act of May 3, 1887, P. L. 158 (Pa.). Under such statutes, a wife, once having taken the stand in behalf of her husband, may be compelled, on cross-examination, to give evidence against him. Ballentine v. White, 77 Pa. 20 (1874).

Under the Act of 1889, *supra,* two novel questions arise: (1) Whether the statute is applicable when the character or conduct of the wife is only collaterally in issue, and is not directly raised by the accused. (2) Whether the act is to be extended to criminal proceedings of every kind or to be limited to proceedings instituted by the wife against her husband. Both questions are answered by the court in the principal case in the affirmative.

PROPERTY—GIFTS *Inter Vivos*—DELIVERY—A piano in the home of the defendant, was used exclusively by his step-daughter, under a claim of ownership; and it appeared that the defendant intended it as a gift to her. *Held:* There was a sufficient delivery. Allen Co. v. Edwards, 154 Pac. 1066 (Cal. 1915).

The sufficiency of the delivery, to constitute a valid gift, depends on the character of the property and the situation of the parties. 2 Schouler: Pers. Prop., Sec. 67; Phenix v. Gilfillan, 47 Ill. App. 220 (1892); Newman v. Bost, 122 N. C. 542 (1898). As far as possible from the nature of the property the delivery should be actual. McHugh v. O'Connor, 91 Ala. 243 (1890). But there may be constructive delivery. Vosburg v. Mallory, 135 N. W. 577 (Ia. 1912); Marsh v. Fuller, 18 N. H. 260 (1846); Phipard v. Phipard, 55 Hun 433 (N. Y. 1890). Between members of the family actual delivery is often hard to prove; and so facts showing an intention to give, coupled with dominion by the alleged donee are generally regarded as sufficient to form a valid gift, as in the principal case. Ross v. Draper, 55 Vt. 404 (1883); Colby v. Portman, 115 Mich. 95 (1897).

REMOVAL OF CAUSES—PROCEEDINGS AFTER REMOVAL—IMMUNITIES—A non-resident was arrested in Philadelphia to answer before a coronor's jury, by which he was discharged. As he was leaving the building in which the inquest was held, he was served with a summons in a civil case. The cause was removed into a federal court. *Held:* He was immune from service of process. Feister v. Hulick, 228 Fed. 821 (1916).

The removal of a cause from a state to a federal court is not a waiver of the defense of irregularity in the service of process; but after the removal, the defendant may raise any question which might have been raised had the writ issued from the court to which the cause has been removed. Wabash v. Brow, 164 U. S. 271 (1896). In Pennsylvania, and in many other jurisdictions, it is held that persons in custody under criminal charges are not immune from service of process, and that this immunity

is confined to parties in civil proceedings, unless it appear that the arrest on the criminal charge was a contrivance to get the defendant into custody in the civil suit. White v. Underwood, 125 N. C. 25 (1899); Wood v. Boyle, 177 Pa. 620 (1896). This distinction is repudiated by the federal courts, which hold that the immunity from service of process extends to all persons under arrest, and whose attendance in court is therefore compulsory. Druelle v. Allen, 193 Fed. 546 (1912); Stratton v. Hughes, 211 Fed. 557 (1914).

Res Adjudicata—JUDGMENT ON DEMURRER—In an action on promissory notes, it appeared that there had been a former suit between the same parties and upon the same facts pleaded, in which a judgment had been rendered sustaining a demurrer to the declaration. *Held:* The former judgment was on the merits, and until reversed was a bar to the later action. Duncan v. Deming Co., 154 Pac. 651 (Okla. 1916).

The principal case is in accord with the general rule that a judgment or decree rendered on demurrer to a material pleading setting forth the facts is as conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case as well as in the latter by matter of record; and facts thus established can never thereafter be contested between the same parties or those in privity with them. Northern Pac. Rwy. Co. v. Slaght, 205 U. S. 122 (1907); People v. Harrison, 253 Ill. 625 (1912). If judgment is rendered for the defendant on a demurrer to the plaintiff's pleading, the plaintiff cannot thereafter maintain against the same defendant or his privies any similar or concurrent action for the same cause on the same grounds as were disclosed in the first declaration. Smith v. Smith, 125 Ga. 83 (1906); Old Dominion, *etc.*, Co. v. Bigelow, 203 Mass. 159 (1909). If, however, the plaintiff in the second suit alleges additional facts, so that the second declaration does not depend for its legal sufficiency on the same question of law as in the first case, he is not prevented from prosecuting a second time the same cause of action. Prall v. Prall, 58 Fla. 496 (1909), and if the demurrer in the former case was based merely on formal and technical defects, the judgment thereon is no bar to a suit on an amended declaration correctly setting forth a good cause of action. Papworth v. Fitzgerald, 111 Ga. 54 (1900). It is well settled, also, that where a demurrer goes both to defects of form and also to the merits a judgment thereon not designating between the two grounds will be presumed to rest on a defect of form. Wotes v. Rwy. Co., 11 Ariz. 39 (1907).

Where final judgment is rendered overruling a demurrer which goes to the sufficiency of the cause of action, the rule is the same as where the demurrer is sustained. Alley v. Nott, 111 U. S. 472 (1884); Cameron v. Hinton, 48 S. W. 24 (Tex. 1898).

SALES—CONDITIONAL SALE—RIGHTS OF THIRD PARTIES—Electrical apparatus was appropriated to a construction contract, the vendor reserving title thereto until payment. The vendee became insolvent and his receivers took over the work, relying on his apparent ownership and thus standing as execution creditors. The vendor sought to hold the owner accountable

to him by virtue of his reserved title. *Held:* The secret retention of title is good only between the parties and not as against execution creditors of the vendee. General Electric Co. v. Richardson, 228 Fed. 758 (U. S. 1916).

The majority rule is that in the absence of fraud conditional sales are valid as well against third parties as against the parties to the transaction. Harkness v. Russell, 118 U. S. 663 (1886). Such third person may be a *bona fide* purchaser from the vendee, Coggill v. Hartford and N. H. R. Co., 3 Gray (Mass.) 545 (1855); Ballard v. Burgett, 40 N. Y. 314 (1869), or an execution creditor, Cole v. Berry, 42 N. J. L. 308 (1880); Herring v. Hoppock, 15 N. Y. 409 (1857). Only a few jurisdictions dissent from this well-settled doctrine. Van Duzor v. Allen, 90 Ill. 499 (1878); Hall v. Hinks, 21 Maryland 406 (1863); Forest v. Nelson Bros., 108 Pa. 481 (1888).

In the principal case the court followed the usual rule to apply the law of the state from which the case is appealed. Since it was a Pennsylvania contract the court embraced the minority view. It was early decided in Pennsylvania that a separation of possession and title gives rise to a false credit. Martin v. Mathiot, 14 S. & R. 214 (1826), citing Clow v. Woods, 5 S. & R. 275 (1819). A distinction is made between a bailment and a conditional sale, Ott v. Sweatman, 166 Pa. 217 (1895), and it has been held that the transfer of possession must be in pursuance of a sale to enable the creditor to attach. Chamberlain v. Smith, 44 Pa. 431 (1863). The case of Forest v. Nelson Bros., *supra,* is held to have settled the law in Pennsylvania that whatever rights the vendor may reserve as between himself and the conditional vendee, the goods in the hands of the latter are subject to levy by his creditors. It has been held that the same principle applies to a receiver where he obtains his authority from the court in the interest of creditors; and so deriving his authority by law, even knowledge of the sale agreement is immaterial. Duplex Printing Press Co. v. Clipper Publishing Co., 213 Pa. 207 (1906).

Statutes have now been passed by a majority of the states requiring the recording of conditional sales.

TORTS—HUSBAND'S RIGHTS FOR ALIENATION OF WIFE'S AFFECTION BY PARENTS—A mother wrongfully persuaded her married daughter to leave her husband. *Held:* The husband could recover from the mother. Francis v. Outlaw, 96 Atl. 517 (Md. 1916).

The right of a husband to maintain an action against anyone who has wrongfully alienated the affections of his wife, and deprived him of his conjugal rights, is well established. Smith v. Lyke, 13 Hun 204 (N. Y. 1878); Gernerd v. Gernerd, 185 Pa. 233 (1898). In a suit, by a husband, against the parents of his wife, for the alienation of her affections, it is not enough to prove merely that the parents enticed her away from her husband, and persuaded her not to live with him. Multer v. Knibbs, 193 Mass. 556 (1907). In addition to these facts, the husband must show that the parents were actuated, in their conduct, by malice or ill will toward the husband, and not by a proper parental regard for the welfare and happiness of the child. Holtz v. Dick, 42 Ohio St. 23 (1884). In such an action, the material question is the intent with which the parent acted,

rather than the wisdom, or even the justice, of the course which he took. Rice v. Rice, 104 Mich. 371 (1895); Hutcheson v. Peck, 5 Johns. 196 (N. Y. 1809). A parent may advise a daughter to abandon her husband, if the parent honestly believes that the continuance of the marriage relation will tend to injure her health, or destroy her peace of mind; and in such case the parent incurs no liability to the husband, though it may develop that the parent acted upon mistaken premises or false information. Oakman v. Belden, 94 Me. 280 (1900); Tucker v. Tucker, 74 Miss. 93 (1896). The burden is upon the husband to show that the parent was prompted by malice in what was said and done, and to overcome the presumption that the parent acted under the influence of natural affection, and for what he believed to be the real good of his child. Brown v. Brown, 124 N. C. 19 (1899).

WILLS—GIFTS *Mortis Causa*—TESTAMENTARY LANGUAGE—A wife immediately prior to an operation which resulted in her death, directed her husband to make certain dispositions of her personal effects but made no further effort to deliver the same. *Held:* Her language was at most of a testamentary character and no gift *causa mortis* resulted. *In re* Liphart, 227 Fed. 135 (U. S. 1915).

The rule is well settled that mere testamentary declarations upon the part of the donor unaccompanied by delivery of the property will not sustain a gift *mortis causa*. Miller v. Jeffress, 4 Grat. 472 (Va. 1848); Basket v. Hassell, 170 U. S. 602 (1897). It has been frequently held that three essentials must exist to effect such a gift: (1) It must be of personal property, (2) The gift must be made in the last illness while under apprehension of death, and (3) there must be a complete delivery at the time. Stokes v. Sprague, 110 Iowa 89 (1899); Johnson v. Colley, 101 Va. 416 (1903). These requisites are generally contrasted with the rules governing a testamentary gift where impending apprehension of death and immediate delivery of the property are not essential. Emery v. Clough, 63 N. H. 552 (1885); Vosburg v. Mallory, 135 N. W. 577 (Iowa 1912).

It has been held that the infallible test in distinguishing a gift *mortis causa* from a testamentary disposition is "delivery, change of dominion *in praesenti*." Trenholm v. Morgan, 28 S. C. 268 (1887). This delivery may be constructive or symbolical, as long as it is as perfect and complete as the nature of property and the attendant circumstances will permit. People v. Benson, 99 Ill. App. 325 (1901); Waite v. Grubbe, 43 Oregon 406 (1903). And so it may be to a third person for the donee. Johnson v. Coolley, *supra*. But it seems that such third person may defeat the gift by his delay in taking possession until after the donor's death, even though the latter's intention was unmistakable. Wilcox v. Matteson, 53 Wis. 23 (1881).

WILLS—WITNESSES—COMPETENCY—A will was attested by a stockholder of a bank which was named as executor. *Held:* By statute the witness, who was otherwise incompetent, was required to testify in support of the will, but was barred from participating in the administration of the estate. Scott v. Couch, 111 N. E. 272 (Ill. 1916).

The competency of a witness is to be determined from the facts as they existed at the time of attestation, and not as they exist at the time when the will is presented for probate. Miller v. Carothers, 6 S. & R. 215 (Pa. 1820); Estep v. Morris, 38 Md. 424 (1873). Likewise in the case of a nuncupative will. Haus v. Palmer, 21 Pa. 296 (1853). So if a codicil gives a legacy to a witness of a will, he is not thereby rendered incompetent. Historical Soc. v. Kelker, 226 Pa. 16 (1909). A credible witness is the same as a competent witness. Boyd v. McConnell, 209 Ill. 396 (1904). But competency is not to be confused with credibility. Klinzner's Will, 130 N. Y. S. 1059 (1911). Generally a witness is competent who is not for any legal reason disqualified from testifying in respect to the subject matter under investigation. O'Brien v. Bonfield, 213 Ill. 428 (1904); Combs's Appeal, 105 Pa. 155 (1884); or who is not beneficially interested in the will. Wiley v. Gordon, 104 N. E. 500 (Ind. 1914). But by statutes in most states the beneficiary loses his interest, if the will cannot be otherwise proved, and he is thus rendered competent. Swanzy v. Kolb, 94 Miss. 10 (1908); Williams v. Way, 135 Ga. 103 (1910). An executor is a competent witness, Snyder v. Bull, 17 Pa. 54 (1851); Tierney's Estate, 103 Minn. 286 (1908), even in a will making a bequest to charity in Pennsylvania. Jordan's Estate, 161 Pa. 393 (1894). So the wife of the executor is competent. Lyon's Will, 96 Wis. 339 (1897). But the wife of the testator is not competent. Pease v. Allis, 110 Mass. 157 (1872); nor is the wife of a devisee. Sullivan v. Sullivan, 106 Mass. 474 (1871). *Contra,* Lanning v. Gay, 70 Kan. 353 (1904). One who is named as attorney in the will is competent. Rehard's Estate, 143 N. W. 1106 (Ia. 1913).

So one who is merely interested in a charitable organization or a member of a church may be competent. Will v. Sisters of St. Benedict, 67 Minn. 335 (1897); Conrades v. Heller, 119 Md. 448 (1912). And a salaried employee of a corporation made a trustee for a charity is not incompetent. Carson's Estate, 244 Pa. 401 (1914). The Pennsylvania cases are not clear as to what is a direct interest. Cf. Kessler's Estate, 221 Pa. 314 (1908), and Jeanes' Estate, 228 Pa. 537 (1910). The trustees of a charity were held interested. Fetterhoff's Estate, 228 Pa. 535 (1910). A member of the executive committee of the charity is not disinterested. Stinson's Estate, 232 Pa. 218 (1911). A charitable bequest was formerly defeated where one of the witnesses was a legatee under the will. Kelly's Estate, 236 Pa. 54 (1912). This has been changed by the Act of 1911, P. L. 702. Leech's Estate, 236 Pa. 57 (1912), *semble.*